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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	92061796
Party	Defendant Kingston Technology Corporation
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Submission	Motion to Dismiss - Rule 12(b)
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Attachments	KINGSTON REPLY RE MOTIONS TO DISMISS.pdf(947622 bytes)

**IN THE UNITED STATES PATENT AND TRADEMARK OFFICE
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD**

US Trademark Application Serial No.: 86/462,159 for HYPERX
Filed: November 22, 2014
Published: March 10, 2015

US Trademark Application Serial No.: 86/418,063 for HYPERX BLITZ
Filed: October 8, 2014
Published: March 10, 2015

Spansion LLC,)	
)	
Opposer.)	Opposition No. 91222728
vs.)	
)	
Kingston Technology Corporation,)	(After Answer is Filed, Filings to be,
)	to be Made in Parent File
Applicant.)	Opposition No. 91218100)
)	
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AND

US Trademark Registration No. 4,721,431 for HYPERX SKYN
Registered: November 22, 2014

Spansion LLC,)	
)	
Petitioner.)	Cancellation No. 92061796
vs.)	
)	
Kingston Technology Corporation,)	(After Answer is Filed, Filings to be,
)	to be Made in Parent File
Registrant.)	Opposition No. 91218100)
)	
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**KINGSTON TECHNOLOGY CORPORATION REPLY REGARDING
MOTIONS TO DISMISS
SECOND AMENDED NOTICE OF OPPOSITION AND
SECOND AMENDED PETITION FOR CANCELLATION**

Kingston Technology Corporation filed Motions to Dismiss actions by Spansion LLC on three separate trademarks for lack of standing. The actions include a cancellation action on Registration No. 4,721,432 of the mark HYPER SKYN, an opposition action on Application No. 86/418,063 of the mark HYPERX BLITZ and an opposition action on Application No. 86/462,159 of the mark HYPERX. Spansion has combined its response in opposition; and this is in reply thereto.

The Opposition exhibits a decidedly accusatory tone. Such tactics appear universally discouraged by the Federal District Courts; and the same is assumed to be true of this Board. Responses in defense thereto will not be presented here beyond a blanket denial of impropriety.

The Standard

The Motions to Dismiss the second amended pleadings applied the legal authority relied upon in the Order of December 9, 2015 finding the Spansion pleadings inadequate to establish standing, *Ritchie v. Simpson* 50 USPQ2d 1023, 1025 (Fed. Cir. 1999). The standard as articulated in this case was fully quoted in the current Motions to Dismiss. The party bringing the action must meet two tests:

1. A "real interest" in the proceedings; and
2. A "reasonable" basis for a belief of damage.

The Order of December 9, 2015 also referenced *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) establishing the standard for pleading supporting factual matters, which must be plausible on their face.

Real Interest

Spancion, in Section III. A. 1. of the Spancion Opposition, would short circuit the standard for review established in the Order of December 9, 2015. Spancion references a finding by the Board that it had to "surmise" that real interest exists from Spancion's general allegations about its line of business in the First Amended Pleadings. Spancion claims it "directly addresses the issues raised in the Board's December 9, 2015 Order" through the Second Amended Pleadings. In the First Amended Pleadings, Spancion broadly asserted that its listed products "have a wide variety of applications". The Second Amended Pleadings allege facts expanding on this "wide variety of applications". Yet, these new allegations, taken as true for pleading purposes, must also be reviewed for real interest; and they fail.

1. Indefinite Allegation of Competition.

Section III. A. 1., page 8 of the Spancion Opposition provides a bullet point list characterizing allegations. This list is asserted to be "substantial detail about competition between the parties." As carefully detailed in the Motions to Dismiss, the actual allegations characterized by this list do not plead competition. The Second Amended Pleadings were carefully read "in their entirety" and nowhere is there a definite allegation of competition. In Section III. A. 2. of the Opposition, Spancion characterizes Kingston's placing "primacy on one small phrase", "Spancion *and/or* its customers". True. One or the other or both was as close as Spancion came to

asserting competition with Kingston regarding the subject matter of the marks at issue. Spansion does not and cannot specifically point in its Opposition to any unequivocal allegation of product competition between Kingston and Spansion in the Second Amended Pleadings.

Spansion raises the issue of alternative pleading, page 8 of Section III. A. 2. "Spansion *and/or* its customers" is an indefinite allegation of fact, not alternative pleadings.

2. Different Lines of Commerce

Kingston presented the specific allegations of Spansion in Section 3 beginning on page 5 of each of the Motions to Dismiss, concluding in the Motion directed to HYPERX:

Spansion customers are product manufacturers and not, *inter alia*, gamers looking for a special mouse pad or audio peripheral, none of which have "computer memory products and embedded systems solutions".

Spansion has not responded to the assertion in each of the Motions to Dismiss and accompanying analyses that the specific goods and the distribution thereof are in different lines of commerce, which indeed they are. The Board continues to be left to surmise real interest when Spansion is not engaged in the sale of the same or related products and is not in the same line of commerce in which it might normally expand. Facts plausible on their face to support an allegation of interest are not found in the Second Amended Pleadings. *Ashcroft v. Iqbal*, *id.*

3. HYPER-BASED MARK

Spansion asserts that a portion of a mark can be attacked by opposition or cancellation. Agreed. But standing requires real interest regardless of whether or not a cause of action is possible. There is no allegation that the marks HYPERX SKYN and HYPERX BLITZ are of any interest to Spansion. Spansion does not allege a real interest or damage from these marks in their entireties. Further, with each of HYPERX SKYN, HYPERX BLITZ and HYPERX, the only commonality with Spansion's allegation of use of HYPER-based marks is obviously the term "hyper". Spansion and Kingston stand among a general category of trademark users that are distinguished by a different suffix to the prefix "hyper". Spansion nowhere alleges that "hyper" is exclusive to or used separately by Spansion. Rather, in the third affirmative defense to that Notice of Opposition No. 91218100 (now the parent in these consolidated matters), Spansion admits unequivocally:

The existence of numerous other registrations on the United States Trademark Office Principal Register in Class 9 beginning with the prefix of "hyper" and including a second element of a generic, descriptive, or disclaimed term, including marks for audio peripherals and mouse pads highly related to those of Opposer [Kingston] and/or Applicant [Spansion], reflects the Trademark Office's and Board's longstanding and accepted principle that composite marks incorporating such combination of elements commonly are found to be not descriptive and not generic.

By its admission, Spansion takes the position that it is found in an industry related group of which Spansion is a member of "numerous" others having marks with the prefix "hyper" and an unrelated second element. Consequently, there can be no plausible real interest in any action against these marks with the only commonality being "hyper".

No Reasonable Basis for Belief of Damages

Turning to the second part of the test for standing articulated in *Ritchie v. Simpson*, id., a “reasonable” basis for a belief of damage requires that alleged facts must be plausible on their face. *Ashcroft v. Iqbal*, id.

Spancion specifically asserts “damage” on two bases in the counts of the Second Amended Pleadings, 1) inconsistency by Kingston in pleadings and 2) the creation of a family of HYPERX marks. In the Opposition, Spancion additionally separately identifies an allegation of fact which is part of the claim for damage for inconsistency in pleadings, now asserting its sufficiency for damage independent of the asserted pleading inconsistency.

1. Pleading Inconsistency

Kingston presented in the Motions to Dismiss, Section 1 beginning on page 6 or 7 in the Briefs, that the allegations of Spancion asserting a pleading inconsistency were not plausible on their face as they alleged identity between “hyper” and HYPERX. There is no inconsistency as the terms are objectively different. Kingston also asserted that there is no reasonable basis to support pleadings creating business damage. Spancion responds that these are merit based arguments, Spancion Opposition, page 14. Spancion emphasizes throughout the Opposition that all that is necessary is well pleaded allegations. Fair enough. But, as articulated by the U.S. Supreme Court, the supporting factual matter must be plausible on its face. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). On its face in the allegation, the application is for HYPERX and the

assertion of descriptiveness on another matter is a different term, "hyper." It further remains on its face that there is no plausible basis to support pleadings creating business damage. It is hornbook law that damage from pleadings is grounded in common law tort for malicious prosecution, available through separate action following final determination of the alleged erroneously pleaded matter.

2. Fact Allegation

Spansion alleges in of its Second Amended Actions:

Spansion and/or its customers currently use HYPER-based terms in connection with the marketing and sale of their products, and have an interest in continuing to do so. Thus, Spansion and its customers are damaged by Kingston's attempt to register the HYPERX-based marks at issue in this proceeding while simultaneously taking inconsistent positions to assert descriptiveness of the "HYPER" element in Spansion's mark at issue in pending Opposition No. 91218100.

In Section III. B. of the Spansion Opposition, the first sentence of this damage allegation is asserted alone as an allegation of damage. This alleged fact fails both for lack of real interest and for lack of reasonable basis for a belief in damages. The fact allegation is indefinite as alleging either Spansion or its customer or both currently use HYPER-based terms. Spansion has not definitively pleaded competition as discussed above. If it is the customers using HYPER-based terms, the wrong party brought this action. The term it uses is not the specific term of any of the Second Amended Pleadings. No claim is made that HYPER-based marks are the singular province of Spansion (see Section 3. below).

3. Family of Marks

Kingston presented in the Motions to Dismiss, Section 2 beginning on page 8, that the allegation of damage from an attempt to develop a family of marks is not plausible. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Spansion asserts that such a "HYPERX-based" family will inhibit Spansion's use of "HYPER-based" terms. The terms are not the same and are without any issue or allegation of confusing similarity. Further, as to the marks HYPERX SKYN and HYPERX BLITZ, they are not alleged in the Second Amended Pleadings to be descriptive or otherwise unregistrable, family or no family.

In making this claim of damage based on an attempt to develop a family of marks, Spansion draws upon other HYPERX inclusive Registrations of Kingston outside of this Action. In doing so, Spansion inherently draws the facts of goods, status, etc. of these Registrations in by incorporation. This incorporated information supports factual plausibility of its claim but omits inclusion of Kingston's Registration No. 2,848,874 for HYPERX. This Registration is incontestable and, unlike the goods of the marks at issue here, is directed to computer memory products comparable with the alleged business of Spansion. The Board is certainly noticed of this Federal Trademark Registration if noticed of those asserted by Spansion. Damage by an attempted creation of a family of HYPERX-based marks grounded upon an incontestable Registration with the "family" extending away from Spansion's asserted business is not reasonably based.

In drawing on marks beyond the present issue, Spansion also neglects its admissions in the third affirmative defense to the Notice of Opposition No. 91218100 (now the parent in these consolidated matters) that Spansion stands among a general category of trademark users that are distinguished by a different suffix to the prefix "hyper". As also quoted above, in the third affirmative defense to that Notice of Opposition, Spansion asserted unequivocally:

The existence of numerous other registrations on the United States Trademark Office Principal Register in Class 9 beginning with the prefix of "hyper" and including a second element of a generic, descriptive, or disclaimed term, including marks for audio peripherals and mouse pads highly related to those of Opposer [Kingston] and/or Applicant [Spansion], reflects the Trademark Office's and Board's longstanding and accepted principle that composite marks incorporating such combination of elements commonly are found to be not descriptive and not generic.

By its admission, Spansion takes the position that it is found in an industry related group of which Spansion is a member of "numerous" others having marks with the prefix "hyper" and an unrelated second element. Spansion alleged damage from an inability to use "HYPER-based" marks lacks any allegation of legitimate real interest distinguishing it from the "numerous" other registrants differing only by suffix. A belief that Spansion will be damaged by any such family is, indeed, unreasonable.

Conclusion

The Order of December 9, 2015 denying standing to Spansion in Opposition No. 91222728 and Cancellation No. 92061796 invokes the standard for pleading standing articulated in *Ritchie v. Simpson* 50 USPQ2d 1023, 1025 (Fed. Cir. 1999), both a "real interest" in the proceedings and a "reasonable" basis for a belief of damage. A

demanding standard requiring a pleading of factual matters plausible on their face to support the allegations was recognized in *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A review of the allegation of facts for plausibility in pleadings is, therefore, appropriate. Looking at the literal meaning of the pleadings, the admissions in the allegations of Spansion and the materials incorporate by Spansion, there is no real interest and no plausible allegation of damage in either of the Second Amended Actions of Spansion. Dismissal of these actions is requested.

Respectfully submitted,

KINGSTON TECHNOLOGY CORPORATION

Date: February 5, 2016

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of this paper is being served upon all parties to this proceeding at the address recorded in the following manner on the date this filing is submitted, February 5, 2016.


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